Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-267

In The

Supreme Court of the United States

October Term, 1995

STATE OF NEBRASKA,

Petitioner,

v.

JOHN W. YELLI,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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QUESTION PRESENTED

Whether there is a Federal question when a State Supreme Court renders the judgement precluding evidence based on the State hearsay statute.

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STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the case – The Facts. Respondent does not accept Petitioner's Statement of the Case – The Federal Question. The Respondent replies to the Petitioner's "The Federal Question" in the first heading of "The Argument".

ARGUMENT

I. THERE IS NO FEDERAL QUESTION.

Respondent respectfully asserts there is no Federal Question involved in the case at hand. The sole reference to a Federal Question in the Appellant's brief comes on page 4 on the fact *Yelli* relied on *Carroll v. Moore,* 228 Neb. 561, 423 N.W.2d 757 (1988). Indeed *Carroll v. Moore,* is the governing case on which the Nebraska Supreme Court held indigent defendants have a right to Court appointed counsel in State initiated paternity cases. *Carroll* itself is a final judgement. The question presented to trial court and the Nebraska appellate courts was "What remedy was appropriate if the defendant's rights under *Carroll* were violated?" The Nebraska Supreme Court held that paternity judgements gained by State initiated petitions were inadmissable in criminal proceedings if the record did not show that the defendant had counsel or waived his right to counsel. Further, the Nebraska Supreme Court in *Yelli* held the prior judgements violated Neb. Evid. R. 803(22) Neb. Rev. Stat. Section 27-803 (22) (Reissue 1989). This is the Nebraska Statute governing hearsay exceptions. (App. 11) Since the basis of judgements was in violation

of the Nebraska evidentiary statute there is no Federal Question involved.

Petitioner asserts that *Carroll v. Moore* involved in part Federal Questions and State Questions. Respondent respectfully asserts that if Petitioner believed *Carroll* carried a Federal Question then the Petitioner should have raised any Federal Question at the time it was appropriate to appeal *Carroll v. Moore* to the United States Supreme Court. The Nebraska Supreme Court decision in *State v. Yelli* does not invoke a Federal Question.

Furthermore, (App. 19) the Petitioner's action to recall the mandate was overruled by Nebraska's High Court. The fact the motion to recall the mandate was overruled and the mandate spread means the order is already final. Given the fact the order in the case Petitioner wishes to appeal is already final, Respondent respectfully submits that the issue is moot.

Petitioner further claims there are facts from which an inference can be made that Yelli was not in fact indigent (p.5 Petitioner's Brief). Petitioner wants to use an "inference" gained from a Paternity Judgement which violated the Constitution of Nebraska. In the Paternity Judgement the Court assessed Yelli the costs. That issue was fully presented to the Nebraska Appellate Courts and given the consideration it deserved (App. 1; App. 20).

II. THE NEBRASKA SUPREME COURT ISSUED AN APPROPRIATE REMEDY FOR DEPRIVATION OF INDIVIDUAL'S FUNDAMENTAL RIGHT OF COUNSEL.

Given the fact that *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), was settled law and Yelli had a right to counsel in paternity cases sought to be used as evidence against him, the Nebraska Supreme Court fashioned the best remedy that was available under the circumstances. The remedy of exclusion of paternity judgments violating *Carroll* was a legally appropriate holding.

A. *Custis* is not applicable to the case at hand.

Custis v. United States, 511 U.S. ___, 128 L. Ed.2d 517, 114 S. Ct. 1732 (1994), held that defendants in Federal sentencings could not challenge the use of state convictions for enhancement on grounds other than previously established by *Burgett v. Texas*, 389 U.S. 109 (1967). The Court in *Burgett* held that state criminal decisions which did not, on record, show the defendant had counsel or had waived his right to counsel in state proceedings, would not be admissible to increase the defendant's penalties in Federal Court. The defendant in the federal sentencing in *Custis*, wanted to challenge not the fact he had counsel in the state decision, but rather to attack the effectiveness of that counsel's representation. The United States Supreme Court stated in *Custis* that the defense could not attack state convictions in Federal Court on issues dealing with rights pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.3d 274 (1969). The High Court stated the proper *Boykin* avenues could be

utilized through other means given the fact the defendant was still in custody. In fact, the final paragraph, *Custis v. United States* stated that the Court, in making this ruling on the relief sought in *Custis*, is in no way stating what the ruling would be if a similar issue was brought up during the appropriate remedy of Federal Habeas Corpus.

For Yelli the most encouraging aspect of *Burgett* and *Custis*, is that the issue in the case at hand far more closely resembles *Burgett* than *Custis*. The reason being, Yelli is seeking to prevent an unconstitutionally gained paternity judgement entry from being used against him. In fact, the settled law after *Burgett* is that the only way a state conviction cannot be used to increase one's penalties in Federal Court, is where that state conviction does not show on record that the defendant had counsel or waived his right to counsel. In Yelli's case that is precisely the problem with the past paternity judgments. The remedy of exclusion is used by the Nebraska Hearsay Statute. Yelli is in no way arguing that the paternity judgements should be excluded for any reason other than he did not have counsel in the prior paternity judgements nor waive his right to counsel.

The Petitioner also relies on *Nichols v. United States*, 511 U.S. ___, 128 L. Ed.2d 745, 114 S. Ct. 1921 (1994). In *Nichols* the United States Supreme Court had held that a State misdemeanor case where the defendant did not receive jail may be used even if the defendant did not have counsel or waive that right. In that misdemeanor case the defendant did not receive jail. Thus there was no right under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny to have counsel to begin with. The settled law

is one only has a right to counsel in crimes that are felonies and in misdemeanor crimes where jail is the result. Therefore, in *Nichols* it is not surprising at all the Court held that a misdemeanor which did not incur the sentence of jail could be used for enhancement even if the defendant was not represented by or waived the right to counsel. Clearly, in Yelli the settled Nebraska Law in *Carroll v. Moore* required Yelli unconditionally to have counsel or have waived that right.

B. There is No Other Meaningful Remedy for Nebraska Defendants in State Initiated Paternity Decisions if the Remedy in the Case at Hand is Thrown Out.

Petitioner asserts that Yelli had to have appealed his denial of counsel in the paternity judgements before the judgements became final in order to have any remedy (p. 12 Petitioner's Brief). The question then becomes "how is an indigent defendant who could have a right to counsel in a state initiated paternity decision, going to perform the complicated procedures of perfecting an appeal and preserving the issue through the appellate process?" Especially when the defendant is not even explained that he has the right to counsel. In *Carroll* the Nebraska Supreme Court held that proceedings were complicated enough that one needs counsel during the proceedings. How reasonable can it be then to expect a pro se defendant to be able to adequately represent himself through an appellate process. Clearly, if the defendant can represent himself adequately through the appellate process, he

probably is competent enough to represent himself in the trial proceedings itself.

CONCLUSION

John W. Yelli urges this Court to deny the petition for writ of certiorari to the United States Supreme Court since there is not a Federal Question involved.

Respectfully submitted,

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